No. 288

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

NATIONAL LABOR RELATIONS BOARD, PETITIONER,

v.

ERIE RESISTOR CORPORATION,

AND

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, LOCAL 613, AFL-CIO

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR RESPONDENT UNION

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INDEX

Authorities Cited

The Company has not denied that the strikers were engaged in protected concerted activity, nor has it denied that the strikers were restrained and interfered with in the exercise of their right to engage in such activity by the grant of preferential seniority to non-strikers (Bd. Br., pp. 13-19; Union Br. pp. 25-26; see also Co. Br. pp. 19-20).

The Company's only defense to the clear application of Section 8(a)(1) to the facts of this case is its contention that the question of violation of Section 8(a)(1) is not properly raised in this case (Co. Br. p. 35, n. 8). This contention is without merit.

The complaint alleges in separate paragraphs that the institution and implementation of the preferential seniority policy violated Section 8(a)(3) and Section 8(a)(1) of the Act (R. 529a-530a). The Board considered and held that this conduct violated both sections. (R. 12a-19a). While the Company asserts that counsel for the General Counsel at the hearing disclaimed any independent violation of Section 8(a)(1), he did not disclaim what the complaint alleged. He merely restated what the complaint itself disclosed,—that there was no conduct apart from that described in the complaint relating to the institution and implementation of preferential superseniority which was alleged as a separate violation of Section 8(a)(1) and which might independently establish anti-union motivation (R. 81a-82a). The fact that the Company's conduct also violated Section 8(a)(3) does not preclude the finding that its conduct violated Section 8(a)(1) when judged under that Section. On the basis of Section 8(a)(1) alone, the decision of the Board warrants affirmation.

The Company's argument with respect to Section 8(a)(3) requires little comment beyond that which already appears in the main briefs (Bd. Br. pp. 27-38; Union Br. pp. 14-25).

While the usage of the terms "intent", "motive", and "purpose" is frequently imprecise, there is a clear distinction between the state of mind or purpose to use a particular means to achieve a desired result, and the reason to desire that the result be achieved. *Hamill* v. *Maryland Casualty Co.*, 209 F. 2d 338, 341 (C.A. 10). Cf. *Pointer* v. *United States*, 151 U.S. 396. It is not the ultimate objective which is an element of the violation of Section 8(a)(3), *Radio Officers' Union* v. *N.L.R.B.*, 347 U.S. 17, 44-45.[1] The Company seeks to ignore this distinction by ignoring also the text of Section 8(a)(3) while purporting to analyze it.

II. The Facts in this Case Support the Board's Decision

The Company asks that it be judged on the facts of its own case and not be required to defend cases other than its own (Co. Br. p. 46). But the Company distorts the facts of its case in attempting to bring this case within the *Mackay* decision, 304 U.S. 333. On the facts of its case, which the Board correctly viewed, it has been properly judged.

The Company describes the preferential seniority arrangement as one which was necessary to permit replacements to remain upon termination of the strike (Co. Br. p. 48). Upon this description rests its entire analogy to *Mackay*. But this was not the effect of preferential seniority. Indeed, no change in the contract was necessary to permit the replacements to stay on after the strike.

As Company witness Ertone testified, without contradiction, under the seniority system which was not in dis-

[1] The Company's argument that the amendments to Sections 10(c) and 10(e) in 1947 preclude the inference of the necessary intent (Co. Br., p. 36, n. 9) was set to rest in the *Radio Officers'* opinion, 347 U.S., at 49-50.

pute, employees could exercise seniority only to claim vacant jobs at the end of the strike. As strikers could return only to unoccupied jobs, there was no possibility at the end of the strike that the replacements would be displaced by returning strikers or laid off employees. The additional seniority given non-strikers played no role in protecting the replacements from layoff or discharge at the end of the strike (R. 411a-415a).

There is thus no substance to the contention upon which the Company now rests its case that preferential seniority was needed to implement its assurance that employees would not be displaced at the end of the strike. Indeed, even if settled terms of the contract had not already protected the replacements against such displacement, all that would have been needed to effectuate this assurance was a simple provision that replacements would not be displaced by strikers or laid off employees upon conclusion of the strike. This is not what the Company sought and not what it insisted upon as a condition to the settlement of all other contract issues.

The preferential seniority upon which the Company insisted had an entirely different impact. After termination of the strike, and after the fulfillment of the assurance to the replacements that they would not be displaced upon settlement of the strike, preferential seniority came into play only when the replacements and those who had not struck were retained in preference to employees who had struck and were not replaced during the strike. Former strikers were then laid off in substantial numbers while non-strikers were retained on the basis of the additional seniority granted them because they worked during the strike.

The Company asserts that in any event it was willing to

negotiate with respect to any plan which would assure the replacements against displacement at the end of the strike, and argues therefore that its conduct was lawful under *Mackay Radio*. Assuming that the Company was willing to settle upon any plan which would implement that assurance, such willingness did not give it the right, when no such plan was negotiated, to insist upon a plan which went further and discriminated against strikers in the terms and conditions of their employment after their return to work.

In fact, the Company's negotiations were not conducted with such an open mind. From the outset, the Company made several specific proposals, none of which was designed to protect replacements against displacement at the end of the strike but all of which granted them preferential seniority after the end of the strike (Union Br., p. 4, and record references set forth therein). When, on May 28, the 20-year plan was unveiled to the Union, the Company had decided that this plan would be placed in effect unless an equivalent or better form of superseniority were agreed upon (R. 120a, 122a, 123a, 436a). From May 28 on, the Company made it clear that preferential seniority for non-strikers was something it had to have and that it would not abandon this demand even if the Union permitted it to rewrite the entire contract (R. 21a; 209a-211a).

Thus, the Company was willing to negotiate only with respect to the form superseniority would take, but all plans it considered had similar discriminatory consequences unrelated to assuring the replacements that they would not be displaced at the end of the strike. Indeed, as pointed out above, as no agreement other than the seniority provisions of the contract which were not in dispute was needed to assure replacements against displacement, the

Company hardly sought by its insistence upon superseniority to negotiate for what the contract already provided.[2]

Thus, the fact that superseniority was discussed at the bargaining table cannot conceal that from May 28 on, if not before, the Company insisted that nonstrikers be given a form of preferential seniority unrelated to their retention at the end of the strike, and having effect only in the event of an economic layoff at some time subsequent thereto. Retention of replacements at the end of the strike is what *Mackay* permits. Discrimination against strikers who are not replaced in favor of non-strikers, both replacements and others, in the terms and conditions of their employment, is what it prohibits.[3]

The fact that the preferential seniority upon which the Company insisted was not equivalent to the assurance given replacements that they would not be displaced at the end of the strike has implications beyond distinguishing it from permanent replacement sanctioned in *Mackay Radio*. While the Board found it unnecessary to decide whether it was necessary for the Company to grant preferential seniority to obtain strike replacements (R. 19a, n. 29),[4] the disparity between preferential seniority and the assurance actually given replacements itself demonstrates that it was not necessary to grant preferential seniority to replacements to obtain them. For all that was necessary to implement this assurance was rejection of any proposal that replacements

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[2] While the Union proposed reinstatement of all strikers at the end of the strike, preferential seniority was not needed to counter that proposal. Mere insistence that replacements not be displaced was sufficient to achieve the Company's object.

[3] Since *Mackay* only permits assurances to replacements, nothing therein can be deemed to sanction either preferential seniority as an inducement to return to work to those who were permanent employees when the strike began, or preference to them after the strike was over.

[4] The contrary finding of the Trial Examiner was not adopted by the Board (R. 3a).

be terminated at the end of the strike. As superseniority was unnecessary to implement the assurance given replacements, it could not have been necessary to induce the replacements to come to work.[5] Many other facts in the record confirm this conclusion.[6] The Company's plea to be judged on the facts, while it seeks to conceal the disparity between the assurance it gave to replacements and its grant of preferential seniority, impels us to point out that the facts indeed condemn the Company's conduct.[7]

III. The Board Properly Reached the Question of Balancing Interests and Properly Resolved that Question

The Company's assertion that the issue of balancing of conflicting interests was advanced for the first time in its brief to this Court is without foundation (Co. Br., p. 14). In its brief to the Trial Examiner and the Board, the Union urged from the outset that the defense of economic necessity be rejected because the employee rights to be pro-

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[5] See *California Date Growers Association*, 118 NLRB 246, at 249, where similar assurances were found insufficient to justify preferential seniority.

[6] For example, there were 300 unprocessed job applications on file at the end of the strike (R. 6a, 207a, 394a); applications came in without solicitation shortly after the strike began (4a; 393a, 394a); nonunit and temporary employees reported for work regularly without any assurances (R. 5a; 395a, 396a); there was a critical labor surplus in the Erie area (R. 6a; 187a-189a, 584a); there was no evidence that the Company utilized superseniority to recruit replacements; Company representatives Ferrell and Shioleno, conceded that the Company could have replaced all strikers if it desired, and Ferrell stated that it proceeded slowly in replacing employees to preserve continuity of employment (R. 6a; 173a, 207a, 345a).

[7] We will not take the time to rebut all the statements in the Company's brief which are either without foundation in the record or contrary to it, but do not thereby concede the accuracy of any statements in its brief which are not specifically challenged. Nor do we concede the relevance of unsupportable assertions, such as the Company's assertion that it is a small plant which has been singled out for prosecution. See *Griffin Wheel Co.*, 136 NLRB No. 144; Standard & Poor's Corporation Records, Vol. C-E, p. 5356 (New York, N.Y., 1962).

tected outweighed the employer's asserted economic justification in the statutory scheme. The Board's decision clearly accepted this contention (R. 12a-19a). In its brief to the Court of Appeals the Board stated "The real question, therefore, is one of accommodating the employer's right to operate his business to the employees' right to engage in activities protected and guaranteed by the Act." The Board proceeded to develop its balancing of interests rationale in detail (Board's Br. below, pp. 14, 22-23). Clearly the theory of this case may not now be rejected or shunted aside as a novel consideration.

The Company's brief offers little defense against the balance struck by the Board.[8] This is not surprising. As the Board has observed, only in the rare case is an ultimate economic objective lacking in the commission of unfair labor practices (Bd. Br., p. 18). It is likely that most illegal acts aimed at breaking a strike, or indeed at thwarting any form of union activity, are motivated by the desire to avoid economic loss and often by the belief that economic survival is at stake. The balance struck by the Board in this case can be upset only by denying its discretion to protect effective exercise of the employee rights to strike, and subordinating the protection of the right to strike to the employer's economic interests whenever the right to strike is effectively exercised. As we have already demonstrated, and the Company has not attempted to refute, such a result would be

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[8] Indeed the Company appears to rely almost exclusively upon its contention that its ultimate economic objective precludes balancing of interests in this case. Compare Co. Br. p. 22, n. 5 with Union Br., p. 32, n. 7. If an ultimate economic objective precludes balancing, then it is immaterial whether it is a significant, insignificant or even unreasonable objective so long as it is the object of the employer's conduct. The Company's assertion that the Board's decision refutes its major premise rests on the this approach and collapses of its own weight with that contention. (Co. Br., pp. 19-20). By the Company's own analysis, balancing is at the heart of the Board's approach. (Ibid.)

in conflict with the statutory scheme and the intent of Congress (Union Br. pp. 22-23; 33-36).[9]

CONCLUSION

For the reasons set forth above, and in the main briefs of the Board and the Union, the decision of the Court below should be reversed and the order of the Board enforced.

Respectfully submitted,

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[9] The broadside attack upon the Board's decision as a "*per se*" decision is without substance (Co. Br., pp. 21-25). *N.L.R.B.* v. *Insurance Agents' International Union*, 361 U.S. 477, involves an entirely different standard under an entirely different section of the Act. Even under that section, certain conduct, without reference to more, justifies a finding that the Act has been violated, *N.L.R.B.* v. *Katz*, 369 U.S. 736; *N.L.R.B.* v. *Wooster Division of Borg-Warner*, 356 U.S. 342. The holding of the instant case is no more a *per se* holding than that in *N.L.R.B.* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333, which balanced the employer's interests against the employees' Section 7 rights to hold that an employer may always assure replacements that they will not be displaced upon conclusion of the strike without regard to whether it was in fact necessary to give such assurances to operate during the strike. Indeed, here the Board's holding is only that the asserted economic justification could not "sanction the *pervasive form of preferred treatment here utilized by the Employer.*" (R. 19a, emphasis added).